

Making **IPR** Work for **SMEs**

IPR ENFORCEMENT
EXPERT GROUP REPORT



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1 | Introduction

1. Helping SMEs Enforce their Intellectual Property Rights

This document presents the results of a European 'Best practice project: strengthening the IPR enforcement of EU industry and SMEs'¹ that has drawn on the knowledge and experience of a broadly based group of experts on the management of intellectual property rights². Intellectual property rights arise where the law grants to people or organisations that create original intangible goods, through their intelligence and ingenuity, the rights to own and commercially exploit them. These rights take the form of copyright, patents, trade marks and related rights.

The project has been based on the perception³ that, although there is now an increasing provision to help small and medium enterprises (SMEs) develop their intellectual property, there is still a need for better support arrangements for small firms when they find that their intellectual property rights are being disregarded or abused – a problem that occurs all too frequently.

The aim of the IPR Enforcement project, then, has been to help SMEs enforce their intellectual property rights by improving the support that is available to them. The contribution of the Expert Group has been to give clear and detailed advice, with a view to helping policy makers and existing support providers to see what SMEs need in this area and how these needs can best be met. The Group has done this on the basis of its knowledge and expertise, but also through an active debate among its members on the relative merits of existing measures across Europe.

The Expert Group is keen to have its advice taken up and implemented and, in order to facilitate this process, it is presenting the results of its work in a systematic way. In subsequent sections, the approach of the Expert Group is explained, along with the policy framework and the detailed results of the work undertaken. We begin, however, with a clear statement of the Expert Group's main conclusions.



¹ Call for tender n° 088496 - 2007 (ENTR/06/060) on http://ec.europa.eu/enterprise/calls/calls_arc2007.html

² Group composition on p. 33 and on <http://ec.europa.eu/transparency/regexpert/detail.cfm?ref=2209>

³ Expressed, for instance, in the 'Marchant Report' - 'A Memorandum on Removing Barriers for a Better Use of IPR by SMEs' June 2007. Pro Inno Europe http://www.proinno-europe.eu/NWEV/uploaded_documents/IPR_Expert_group_report_final_23_07_07.pdf

2 | Key Messages

2. IPR Enforcement – Key Messages

The IPR Enforcement Expert Group would like to begin its Report by giving 9 clear messages to policy makers and business support organisations that summarise its key conclusions on improving the way SMEs enforce their intellectual property rights. A more detailed statement is presented in the following sections of this report and the full set of Recommendations is set out in section 6.3. Annex A provides an overview of the relationship between the Key Messages and the corresponding Recommendations and Case Studies.

Message no. 1 : ‘Do it better – bring it together’

Support for IPR and its enforcement is still hopelessly fragmented, in spite of some encouraging developments. To deal with this, it is necessary to establish IPR Co-ordination Offices at both at European and at national levels.

These Offices should be established with the appropriate authority and should be responsible for promoting, co-ordinating and monitoring IPR enforcement, working with the courts, police and customs authorities and ensuring an efficient exchange of information between the different agencies and of experience between countries.

They should also promote more effective co-ordination on IPR enforcement by existing business support organisations.

Message no. 2 : ‘Understand the needs of SMEs’

The IPR problems of SMEs are overlooked or underestimated by the police and customs authorities and by the courts and legal profession. SMEs can be helped to work more effectively with these agencies (one of the roles of the Co-ordination Offices), but the staff of the agencies should also be trained to take SMEs’ problems more seriously.

Message no. 3 : ‘Help SMEs prepare’

Effective enforcement of IPRs rests on proper IP management. You can’t enforce rights that are not clearly documented and, where appropriate, registered.

The principles of Intellectual Asset Management have to be built into support programmes and training – both for enterprises and for those responsible for policy development and implementation.

Message no. 4 : ‘Make enforcement a part of the bigger innovation picture’

It’s no use encouraging enterprise and innovation if the benefits cannot be secured. IP management and provision for enforcement have to be seen as part of the innovation cycle and supported and funded as such, through EU and national R&D programmes and innovation support.

Message no. 5 : ‘Do it properly’

Frankly, support for IPR enforcement is a bit of a mess. There is some very good provision, but it is patchy and seldom co-ordinated. As a start, a common intellectual property service has to be developed everywhere rather than the differing services for each type of IPR that are still the norm in most countries. Then, there is a need for better co-ordination between specialist IP advisers and generalist SME support agencies. All ought to be driven by the principles of good enterprise support management.

Message no. 6 : ‘Carry it home to consumers’

A continuing effort is needed to bring home to consumers the implications of their use of counterfeit or pirated goods. Greater awareness of the potential damage and dangers could eliminate the need for much enforcement.

Message no. 7 : ‘Learn from what’s out there’

There are lots of examples of good practice, from schemes to deal with hot spots of potential counterfeiting and piracy such as trade fairs to anti-counterfeiting desks at embassies and consulates in problem countries outside Europe. We provide both a definitive set of the support measures needed and case studies highlighting some of the best practices.



Message no. 8 : ‘Help SMEs meet in the middle’

A greater availability of mediation services in suitable cases would help SMEs, not least in enabling them to avoid formal court proceedings.

Message no. 9 : ‘Solve the problem of paying for it’

Expensive enforcement action presents major difficulties for SMEs; they don’t expect hand-outs, but there is lots that can be done to help, from promoting insurance schemes to encouraging anti-counterfeiting and anti-

piracy organisations to broaden the base of their membership and activities.

Similarly, the issue of funding effective support and enforcement processes has to be resolved. The Expert Group is convinced that its proposals will promote a more efficient use of existing resources and that extensive additional funding is not required. It is important, however, to address this issue squarely.



3 | Explaining the Process

3.1 The Structure of the Report

In order to support the main conclusions of the Expert Group and to explain the reasoning behind them, the following sections of this document give a broader account of the views that the Expert Group wishes to express and how they were arrived at. These sections are arranged as follows:

- Initially there is an explanation of the composition of the Expert Group, how it came to be formed and how it has gone about its work.
- A brief section follows on current developments in policy on Intellectual Property Rights, especially as it relates to SMEs.
- We then present the Expert Group's characterisation of the measures needed to support SMEs in their enforcement of IPRs in the form of a structured set of enforcement services and measures, together with an explanation of the reasoning behind the set. This section will also refer to other outputs from the Expert Group's work, especially the Inventory of IPR Enforcement Measures that it has helped to create and the Case Studies on good practice that highlight existing practices which already implement aspects of the Group's recommendations.
- Finally, a full set of recommendations is presented, together with proposals for promoting their take-up.

Annexes to the document provide supplementary material, including a table showing the correspondence between the Key Messages the full Recommendations and the Case Studies, the actual Case Studies and the Inventory of Enforcement Measures.

The main wish of the Expert Group is to communicate, to policy makers and existing support providers, the urgency of acting to help SMEs have the confidence to assert their rights and gain the rewards of their creativity and innovation.

3.2 The Nature of the Expert Group

The Expert Group on the Enforcement of Intellectual Property Rights was called together by DG Enterprise and Industry of the European Commission in 2007 to help define the nature and range of the assistance required by small and medium-size enterprises (SMEs) that are confronting problems with their intellectual property rights being disregarded or abused.

The immediate context for this initiative was the work carried out by DG Enterprise and Industry under the heading 'Strengthening the IPR Dimension of EU Industry and SMEs' within the 2007 Work Programme. This reflected the increased emphasis placed on IPR and knowledge management since the 2005 relaunch of the Lisbon Strategy for growth and jobs. It also reflected the provisions in the Enforcement Directive⁴, which envisaged measures and procedures being set up to support the enforcement of intellectual property rights, and to take appropriate action against those responsible for counterfeiting and piracy.

The Commission invited the Member States, EEA countries and applicant countries to nominate two experts each to participate in the work of the Group over an 18 month period. A total of 55 experts were nominated. A wide range of experience was represented, with members from government ministries, patent offices and state organisations dealing with copyright, members of anti-counterfeiting and anti-piracy groups and experts from general and specialist business support organisations and from innovation promotion agencies, from the police and customs authorities, patent and IP lawyers and academics. Between them, members also had experience of all types of intellectual property.

3.3 The Aims of the Expert Group

The primary aim of the Expert Group has been:

- to examine the support actually and potentially available to SMEs to help them enforce their intellectual property rights;
- to identify good practice; and
- to propose a suitable package of services and measures that the Expert Group believes should be generally available to SMEs.

In making its recommendations, the Expert Group had to bear in mind realistic budgetary constraints, but also the commitment of public authorities, made to SMEs under the European Charter for Small Enterprises and elsewhere, to develop 'top-class small business support'.

⁴ Directive of the European Parliament and the Council on the enforcement on intellectual property rights (Directive 2004/48/EC) OJ L 157, 30.4.2004, p. 45–86.

In practice, the Expert Group worked to develop and expand an initial framework of measures, to enunciate guiding principles in enforcement support and to identify examples of good practice.

3.4 The Working Procedures of the Expert Group

The main focus of the Expert Group's work was a series of four meetings that took place in Brussels between January and October 2008, but, in addition, there were a number of working sub-groups that addressed particular issues within the wide range of areas under consideration.

The main meetings in Brussels agreed the general orientation of the work to be undertaken, received feedback from working groups and approved summary statements of agreed positions. They also provided the occasion for meetings of the sub-groups of experts that undertook the more detailed work on particular areas. Between meetings sub-group members communicated with each other under the co-ordination of rapporteurs.

Staff from the Commission services chaired the Expert Group's meetings and the Group was also supported by the Centre for Strategy and Evaluation Services (CSES), which helped organise the meetings, develop the analysis and write-up the proceedings and conclusions.

In undertaking the work, the Expert Group adopted certain guiding principles that were observed throughout the project. These are referred to in greater detail in section 5.1.

The Enforcement Expert Group hopes that it has been able to use the talent and expertise of its members to good effect, providing useful detail on the potential development of services for SMEs and developing new insights into the main issues in this area. To this extent, the Group believes, it has been able to make a significant and practical contribution to the policy framework set out in the next section.



4 | Explaining the Process

4.1 IPR and EU Strategy for Growth and Jobs

The European Council held in Lisbon in March 2000 set the ambitious aim of making the EU the most dynamic and competitive economy in the world by 2010. It also proposed innovation as one of the ways to achieve this aim, through the open method of coordination, drawing on processes of best practice identification and exchange. The relaunch of the Lisbon Strategy in 2005⁵ brought a refocusing of its aims and objectives, along with a renewed political determination and a revised governance structure.

Enterprise and innovation have been one of the central themes in the whole Lisbon Strategy. An early indication of the approach was the 2005 Communication on Industrial Policy⁶. This Communication identified IPR as a critical issue in a knowledge-based economy and proposed an Intellectual Property Rights and Counterfeiting Initiative as one of seven new cross-sectoral policy initiatives to be undertaken in response to the challenges of the relaunched Lisbon Strategy.

Awareness of the significance of IPR within this context had been growing for some time. As knowledge becomes a more and more significant factor in modern economies and as more and more wealth takes the form of often fragile intangible assets, establishing the ownership of such assets and securing the rights to corresponding income flows becomes more important both to the individuals and companies concerned and to the economy more generally.

Gradually this awareness is transforming itself into the development of active Intellectual Asset Management. This new discipline within management culture is beginning to introduce processes and procedures that, first of all, recognise the importance of intellectual assets and then go on to provide effective management of them, within legal and organisational structures that are adapted appropriately. A major problem that intellectual asset managers have to face, however, is the blatant disregard of IPR in counterfeiting, piracy and other infringements of intellectual rights.

⁵ 'Working Together for Growth and Jobs: a New Start for the Lisbon Strategy' - COM(2005)24.

⁶ European Commission Communication 'Implementing the Community Lisbon Programme: A Policy Framework to Strengthen EU Manufacturing - towards a more integrated approach for Industrial Policy' - COM(2005) 474.

4.2 Counterfeiting and Piracy

The extent of counterfeiting and piracy is still difficult to determine with any accuracy. However, what is clear is that it is now a major threat to consumers, businesses and local and national economies. A study on the Economic Impact of Counterfeiting and Piracy by the OECD in 2007⁷, suggested that internationally traded counterfeited or pirated products in 2005 could have been worth up to USD 200 billion. This is equivalent to 2% of world trade. Furthermore, this figure does not include counterfeit and pirated products that are produced and consumed domestically, nor non-tangible pirated digital products being distributed via the Internet. If these items were added, the total magnitude of counterfeiting and piracy worldwide could well be several hundred billion dollars more.

The OECD study also shows that counterfeit and pirated products are being produced and consumed in virtually all economies and that, in recent years, there has been an alarming expansion of the types of products being infringed. Counterfeiting is no longer concentrated on luxury items (such as deluxe watches and designer clothing), it now threatens the personal health and safety of consumers through items such as pharmaceutical products, food and drink, medical equipment, personal care items, toys, tobacco and automotive parts.

Moreover, the risks and losses incurred do not only affect the individuals or firms who are cheated in this way. There is more general economic and social damage. For example, the loss of income through counterfeiting undermines investment both directly and through detrimental effects on business confidence. Counterfeiting also injures reputations and acts as a disincentive to creativity and future innovation. Furthermore, it is frequently tied in with tax avoidance, impacting on national revenue and the public services that taxation funds.

Conversely, a strong IPR regime, including the robust enforcement of rights, has positive effects, both economic and social, creating a stable environment in which to make investment decisions. It provides a clear basis for joint ventures, licensing and other forms of business co-operation and it can contribute to the development of new, pioneering business models.

⁷ OECD 'The Economic Impact of Counterfeiting and Piracy' DSTI/IND(2007)9

4.3 EU Measures for IPR Protection and Enforcement

Policy reaction to the issues of IPR protection and enforcement has been rather mixed in the past. On the one hand, there has been continuous development of an IPR agenda, in the journeys towards the creation of a Community Patent and a single jurisdiction for patents in Europe. The Directive on the Enforcement of intellectual property rights⁸ ('the Enforcement Directive') was agreed in 2004. This places a general obligation on Member States to set up measures and procedures to ensure the enforcement of intellectual property rights. Within this, States must have structures to permit appropriate action to be taken against those responsible for counterfeiting and piracy. The Directive also brought in a series of provisions relating to the improvement of procedures for gathering and preserving evidence, for granting injunctions to halt further infringements against rights holders and for authorising the precautionary seizure of the assets of alleged infringers. Through this the Enforcement Directive has strengthened the protection that civil law offers to persons whose intellectual property rights have been infringed within Europe.

Nevertheless, it has to be said that, until recently, the focus of IPR policy for SMEs has been primarily on encouraging small firms to innovate and generate IPR rather than on managing intellectual property and enforcing rights. And, to the extent that the abuse of IPR was perceived to be a problem for SMEs, the response tended to be to attempt to raise awareness of the issue among SMEs and consumers rather than to support action to help SMEs address it directly. The initiative to set up the Expert Group on Enforcement was part of the response to a perceived gap in policy coverage, but, as will be seen in the next section, there have since been other developments in the area that put the work of the Expert Group at the centre of the picture.

4.4 The Current Policy Context

The Small Business Act

An important restatement of Enterprise policy was made by the Commission in June 2008 in the form of the Small Business Act⁹, which begins with the statement that 'managing the transition towards a knowledge-based economy

is the key challenge for the EU today' and goes on to explain the critical role of the growth and innovation potential of SMEs for the future prosperity of the EU.

The aim of the Small Business Act is to achieve a breakthrough in EU SME policy and to promote SMEs' growth, in particular, by helping them tackle the remaining problems which hamper their development.

Ten operational principles are set out to guide the conception and implementation of policies both at EU and Member State level and in the discussion of these principles there are several references to the role of IPR and its active management, including :

- 'paying particular attention tothe enforcement of intellectual property rights';
- inviting the Member States to provide SMEs with advisory services including support to defend themselves against unfair commercial practices; and
- encouraging active intellectual property management by SMEs.

Support for Intellectual Property Rights and their enforcement, then, clearly have a significant role in the management of the transition towards a knowledge-based economy that is at the heart of the Small Business Act.

The Industrial Property Rights Strategy for Europe

In July 2008, the Commission adopted a Communication on 'An Industrial Property Rights Strategy for Europe'¹⁰. This adds substantial detail to the developing IPR agenda.

Starting from the point that 'Europe requires strong industrial property rights to protect its innovations and remain competitive in the global knowledge-based economy', the Communication reiterates that the Community Patent continues to be a key objective for Europe, as the solution which would be both the most affordable and legally secure answer to the challenges with which Europe is confronted in the field of patents and innovation. Talks to make this a reality continue to take place.

⁸ Directive of the European Parliament and the Council on the enforcement of intellectual property rights (Directive 2004/48/EC) OJ L 157, 30.4.2004, p. 45–86.

⁹ Communication from the Commission 'Think Small First' A 'Small Business Act' for Europe; 25.6.2008 COM(2008) 394 final

¹⁰ Communication from the Commission 'An Industrial Property Rights Strategy for Europe' 16.7.2008 COM(2008) 465 final. Debate on changes to copyright arrangements, especially in response to digital developments, has been promoted by the Green Paper 'Copyright in the Knowledge Economy' COM(2008) 466 final. Currently enforcement issues do not figure prominently in this debate.



The Communication on an Industrial Property Rights Strategy also sets out an approach towards an agreement on an integrated EU-wide jurisdictional system, before going on to consider a series of other issues that are necessary for a sustainable strategic approach to industrial property rights.

Three proposals are made under headings such as 'Improving SME access to industrial property rights' and 'dispute resolution procedures', 'Quality support for SMEs on the management of Industrial Property Rights' and 'Enforcement of Intellectual Property Rights – Combating Counterfeiting and Piracy'. Attention is also given to the international dimension. These proposals are quite specific and resonate closely with the work of the Expert Group. They include the following :

Member States are encouraged to:

- provide sufficient support for SMEs to enforce their industrial property rights;
- raise awareness of intellectual asset management for all businesses and researchers;
- help national patent offices and technology/development agencies work together;
- enhance coordination and best practice exchange between key players - customs authorities, the police, trading standards officers, prosecutors, IP offices;
- facilitate cooperation with the customs authorities and exchange data that will enable customs to target suspect shipments successfully.

The Commission undertakes to :

- promote further awareness-raising activity;
- work to improve cooperation between all players involved in the fight against counterfeiting and piracy within individual Member States;
- explore solutions for Europe-wide actions through an effective network for administrative cooperation between Member States;
- help the public and private sector work together;
- broker an inter-industry agreement to reduce internet piracy and selling of counterfeit goods;
- target high risk traffic of counterfeit goods by promoting the use of information-sharing;

- work with Member States to improve intelligence networks and study how information collection and documentation of illegal activity can be more effective;
- develop a new customs action plan against counterfeiting and piracy;
- further help companies in third countries, in particular by building on and extending the IPR Helpdesk in China;
- develop a joint action plan against counterfeiting and piracy with the Chinese customs authorities.

Finally, Member States are invited, within the scope of the Lisbon Strategy, to ensure sufficient information and resources are available to enforcement authorities to work constructively with right holders in combating violations of intellectual property.

The Communication was very much welcomed by the Council, which adopted a Resolution on a Comprehensive European Anti-Counterfeiting and Anti-Piracy Plan on 25th September 2008¹¹. This resolution also emphasised 'the need to mobilise all stakeholders to boost the effectiveness of the whole range of instruments for protecting intellectual property and combating counterfeiting and piracy on the internal market and internationally'.

The Expert Group has then been working to put flesh on the bones of the policy actions set out in the Small Business Act and the Communication on Industrial Property Rights, going on to identify gaps in the proposed provision and to define a consistent framework as the basis for further work.

The Marchant Report

In developing its thinking and eventually its conclusions, the Expert Group was able to call on other work undertaken by the Commission services and elsewhere. A key source was the report presented to the Commission in June 2007 by the group of experts chaired by Ron Marchant, former Chief Executive of the UK Patent Office (now the UK Intellectual Property Office). The report, entitled '*A Memorandum on Removing Barriers for a Better Use of IPR by SMEs*' was produced for DG Enterprise and Industry alongside other work on the use of IPR by SMEs, on which it commented.

¹¹ Council Resolution on a comprehensive European anticounterfeiting and anti-piracy plan (2008/C 253/01).

The report took a broader view of the use of Intellectual Property and Intellectual Property Rights by SMEs than the current exercise, with its particular focus on enforcement. It addressed, for instance, the various IP strategies open to SMEs, including both the development of informal IP strategies and the acquisition of formal IP rights and also the possibilities for collaboration with larger companies. It also presented a review of the various forms of support available for SMEs on all IPR matters across EU Member States.

In addition to providing a useful account of the more general context in which the IPR Enforcement Expert Group undertook its work, the Marchant Report also referred to particular issues that the Expert Group has since tried to take further. These include :

- the gaps between SME needs and the support provided and the inconsistencies and shortcomings in support provision;
- a recommendation that IP and IPR support services are integrated with general business support and that current support partnerships need to be rationalised and duplication and inefficiency removed;
- the argument that the discipline of intellectual asset management needs to be promoted;
- the recommendation that work on the effectiveness of insurance be completed and assessed.

In addition, the Marchant Report presented the results of the study carried out by the Austrian Institute for SME Research, 'Benchmarking Regional and National Support Services for SMEs in the Field of Intellectual and Industrial Property'.

The Actions of the European Commission and EU Networks
As a final element in a description of the EU policy context in which the Enforcement Expert Group conducted its work, there should be a brief mention of some relevant operational activities of the European Commission, including the business support networks and services that it supports:

China IPR SME Helpdesk: The China IPR SME Helpdesk¹² provides free information, first-line advice and training support to European SMEs to help them protect and enforce their IPR in China. It provides the knowledge and business tools required to develop the value of intellectual property rights

¹² <http://www.china-iprhelpdesk.eu/>

and to manage related risks. A range of practical training tools available in web-based forms and through training workshops in Europe and China are being developed.

Applications for Action: The Commission's Directorate General for Taxation and Customs Union helps right holders protect themselves from counterfeiting and piracy by facilitating direct contact with the relevant customs services of the Member States, where they can lodge an application for action. Details of contacts and the appropriate forms in a common format are available on the Commission's web site.¹³

Multi-lateral and Bi-lateral Discussions: The Commission's Directorate General for Trade is involved in a number of formal and informal discussions with the authorities of trading partners around the world in which intellectual property issues are raised. These discussions have, for instance, pushed for increased protection for European geographical indications and for designs and involved exchanges of information on best practices with, for instance, the US. DG Trade also monitors progress on the issues raised.

Enterprise Europe Network: Launched in 2008, the Enterprise Europe Network¹⁴ combines and builds on the former Euro Info Centres and Innovation Relay Centres, providing a 'one-stop shop' for enterprises for information and advice on European matters. At a local level, the network members are usually based in established providers of support to business, Chambers of Commerce, development agencies, innovation and research centres. A number have specialised knowledge of various aspects of IP management.

IPeuropAware: established in 2007, the IPeuropAware network is composed of 20 European National Patent Offices. The main aim is to upgrade the provision of IPR support services to SMEs. Members provide information on IP matters and help businesses integrate IP into their innovation strategies and business planning. IPeuropAware manages the InnovAccess¹⁵ web site that provides guidance through the steps necessary to manage and exploit innovative ideas and has also taken over the management of the IPR-Helpdesk¹⁶, which continues to provide the Helpline and training for current and potential contractors in EU-funded research projects.

¹³ http://ec.europa.eu/taxation_customs/customs/customs_controls/counterfeit_piracy/right_holders/index_en.htm

¹⁴ See http://www.enterprise-europe-network.ec.europa.eu/index_en.htm

¹⁵ <http://www.innovaccess.eu/index.jsp>

¹⁶ <http://www.ipr-helpdesk.org/index.html>

5 | Enforcement Support Measures

5.1 The Expert Group's Approach

The Expert Group saw its role as being to make use of the wealth of direct experience and expertise offered by its members to provide a consistent, detailed and comprehensive description of the enforcement support needed by SMEs. In order to do this systematically, the Expert Group established a set of principles at an early stage to guide its more detailed work. These principles were:

- the developments would build on and complement earlier and on-going work carried out at a European level and by the Member States;
- a balanced approach to the differing forms of IPR would be adopted;
- the developments proposed and promoted would conform to the principles of identified good practice in support service design¹⁷;
- they would aim to build management capacity and support the development in smaller firms of soundly-based processes of intellectual asset management;
- the proposed support package would be coherent with other forms of support service provision;
- the project would focus on initiatives that have a public policy objective in the IPR Enforcement area irrespective of their ownership and organisational arrangement;
- the aim would be to ensure that public provision integrates effectively with services provided by the private sector;
- recommendations would be realistic in budgetary terms and build, wherever possible, on existing provision.

Differing Forms of IPR

A starting point for identifying the appropriate forms of enforcement support was to define clearly the types of IPR that were to be considered. A statement by the Commission¹⁸ interpreting the scope of the Enforcement Directive had listed the following:

- Copyright;
- Rights related to copyright;
- Sui generis right of a database maker;

¹⁷ See, for example, the Commission Staff Working Paper on Top Class Business Support Services, SEC(2001) 1937, 28.11.2001 http://ec.europa.eu/enterprise/entrepreneurship/support_measures/support-services/staff_working-paper_2002_en.pdf

¹⁸ Statement 2005/295/EC by the Commission concerning Article 2 of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights (OJ L 94 of 13.4.2005).

- Rights of the creator of the topographies of a semiconductor product;
- Trademark rights;
- Design rights;
- Patent rights, including rights derived from supplementary protection certificates;
- Geographical indications;
- Utility model rights;
- Plant variety rights;
- Trade names, in so far as these are protected as exclusive property rights in national law.

Discussion in the Expert Group, drawing on a framework provided by the IPR Helpdesk, led to the following categorisation :

			Patents		
			Utility Models		
		Inventions	Plant Varieties		
			Topographies of Semiconductor Products		
IP	Industrial Property		Trade Marks	Rights in Common Law, Tort, Competition Law etc	Trade Secrets,
		Distinctive Signs	Trade Names		Licensing & Confidentiality
			Geographical Indications, Designations of Origin		Agreements
		Aesthetic Creations	Designs (industrial design)		
	Intellectual Property	Literary, Scientific, Artistic Creations	Copyright (and neighbouring rights)		

Derived from : 'Intellectual Property & Business, Basic Concepts' IPR Helpdesk

The Expert Group, then, took a broad view of intellectual property, consistent with its belief in the importance of promoting a disciplined approach to intellectual assets management, where 'intellectual assets' are understood to include not only the legally recognised forms of intellectual property – patents, trademarks, copyright etc. – but also the wider group of intangible assets including brands, goodwill, know-how, trade-secrets - in fact, almost all the intangible assets of an enterprise other than its human capital.

Support 'Services' and Support 'Measures'

A further initial clarification was the distinction between Support 'Services' and Support 'Measures'.

A 'support service' was defined as a service that is directly provided to enterprises, usually by a dedicated agency, to assist them in carrying out their business functions.

A 'support measure', in contrast, was considered to be a broader public policy initiative that aims either to assist enterprises in carrying out their business functions or to promote their involvement in other policy initiatives. A 'support measure' may, therefore, include the provision of a support service, but equally it may provide support indirectly (for instance, providing finance or subsidising the provision of services by other parties) or it may promote enterprise participation in other activities (for instance, subsidising enterprise participation in trade fairs).

In the case of the IPR Enforcement project 'measures' and 'services' were expected to overlap to a large extent, but it was clear, although consideration had to be given to specific services, the broader range of support 'measures' were the target of the Group's consideration.

It was also agreed in defining the scope of these measures that the main focus had to be on the support provided through public policy initiatives, support provided by public agencies or through semi-public organisations, such as Chambers of Commerce, and business associations. It was expected that the services provided by private businesses, such as law practices, would not generally be covered, except in so far as their services are connected with a public policy initiative - by providing a service on behalf of the public authorities, for instance, or by having an arrangement to provide services (perhaps on special terms) through a business support organisation.

Good Practice in Support Service Design

In broad terms, it was felt that the elements of an effective support package would:

- be readily accessible by SMEs;
- cover the main issues that an SME is likely to face;
- provide effective assistance to the SME in taking appropriate action.

It is also desirable that the types of support identified conform to general best practice in the provision of business support services. A useful starting point here was provided by the Commission services¹⁹ in the identification of the characteristics of the 'Top Class Business Support' that is promised to SMEs in the European Charter for Small Enterprises. After an extensive analysis of support service provision over several years, 15 principles were defined as characterising best practice. These included :

- the fundamental importance of being client-orientated;
- the need for coherence and consistency in service provision and the avoidance of new stand-alone initiatives;
- the development of core packages of services, differentiated to meet the differing needs of different types of enterprise;
- the need to base support services on a common methodology centred on assisting enterprises to build their own management capacity;
- quality standards and evaluation;
- professionalism in support service staff.

Some of these principles are easily stated, but a lot more difficult to apply in practice. For the IPR enforcement project, it was felt, there were the following implications:

- the development of effective services had to be driven by the needs of SMEs rather than the organisational circumstances of existing support organisations;
- any proposed services should, nonetheless, build on and be well-integrated into existing provision;
- a comprehensive package of support should be defined, covering the full range of requirements of SMEs in the area of IPR enforcement;

¹⁹ Commission Staff Working Paper on Top Class Business Support Services, SEC(2001)1937, 28.11.2001 http://ec.europa.eu/enterprise/entrepreneurship/support_measures/support-services/staff-working-paper_2002_en.pdf



- where possible, the elements of the support package should help to contribute in a consistent way to capacity building within SMEs, and, in particular in this case, to the promotion of a consistent approach to intellectual asset management;
- careful consideration should be given to the appropriate levels of provision for the different elements of the support package, national, regional and local, and the degree of integration between the different levels;
- where possible, quality criteria should be set out.

Within this overall framework, however, it was soon clear that there had to be special consideration to the specific characteristics of IPR and IPR enforcement.

The Innovation Framework

Considerable effort and expense is devoted to the promotion of innovation by the EU and Member State authorities. It has been seen that innovation is a central theme in economic and related policy from the revised Lisbon Strategy to the detail of operational policies across the continent. It has also been seen that IPR and its management have been identified as critical elements in the encouragement of innovation and in its exploitation. In considering support measures for IPR enforcement, then, it soon became apparent that it was essential that a proper relationship should be established with the agenda and institutional arrangements of innovation promotion.

This meant that the developments taking place in thinking about the nature of innovation and its effective promotion had to be taken on board and that any new ideas about enterprise support had to take account of the characteristic institutional arrangements that support innovation. These include specific organisational forms, like technology parks, business incubators and innovation centres, but also the networks of innovation support at EU, national and regional level, often involving more generalist support agencies, and the characteristics of innovation strategies adopted by numerous development agencies.

These considerations meant that it was important for the Expert Group to see the place of IPR enforcement within the cycle of innovation management. They also emphasised the importance of intellectual asset management as a methodology that should underlie a wide range of the support services under consideration.

In particular, the Expert Group was keen to emphasise that the enforcement of IPR is not possible without proper IP management. If rights are not registered or documented, they cannot be enforced. Furthermore, enforcement cannot be an after-thought. The possibility of needing to take enforcement action should be built into business planning. Far from being an abstract construct, the innovation cycle refers to real business processes.

5.2 Identifying the Key Elements

Having established the principles governing the approach to their work, the Expert Group organised itself to take on the tasks necessary to deliver a useful result. The Group was keen to see practical results from its work and therefore identified the following range of tasks :

- the elaboration of a description of the enforcement support measures that should be available to SMEs;
- building up a reference document with an inventory of typical measures;
- analysing recurrent themes and drawing out general principles;
- identifying particular examples of practice that illustrate these principles;
- formulating conclusions and policy recommendations;
- proposing a dissemination strategy.

The Expert Group addressed these tasks throughout the project, but a central focus for the work undertaken was provided by the elaboration of this Report and its Annexes, describing specific kinds of enforcement support within a structured framework.

5.3 Describing IPR Enforcement Support

To begin the work of describing the range of support that is actually and potentially available to SMEs in the enforcement area, a preliminary typology of enforcement support measures was first developed and agreed, drawing on the experience of the consultants assisting the project. The aim of this typology was to identify the range of support that is or could be available and to see if this could be categorised in a systematic way. This typology of support measures divided them into several categories, in general, starting with information provision and activities that are most directly and widely available and moving on to areas that are more specialised or more concerned with policy. Each category had a number of elements within it.

A good part of the subsequent work of the Expert Group used this structure to elaborate ideas on the sort of measures that, in the experience of the Expert Group, SMEs need. In the course of this, the various working sub-groups identified additional elements, examined their organisation and the relationships between different services and suggested new approaches. These were then discussed by the Group as a whole, before being incorporated into the general framework.

The following sections set out the results of this process and thus describe the set of measures that the Expert Group, as a whole, recommends should form the basis of a comprehensive provision of support for SMEs in the area of IPR enforcement.

5.3.1 Initial Information, Signposting

The first port of call for many enterprises, when seeking information and advice is their local support agency, Chamber of Commerce, regional development agency or business support centre. These organisations are often generalist in nature and are expected to be able to assist with a wide range of business issues. Nonetheless, because collectively they have the broadest reach and most direct contact with SMEs, there should be at least a basic service provided, with the possibility of further referral on to more specialised agencies.

Any business support agency, then, should be able to provide an SME with initial information and orientation on IPR and IPR enforcement, including an initial diagnosis of problems, wherever possible, on a 'one-stop-shop' basis. Similarly, they should be in a position to refer clients to appropriate specialists, either in-house or in other agencies or service providers. Sometimes this might take the form of a dedicated helpdesk. This type of service should be widespread and easily accessible by any SME.

The service provided should include :

- initial information & orientation;
- provision of guides and brochures;
- initial diagnosis of problems;
- signposting and reference to appropriate specialists;
- an IPR Helpdesk;
- a Hotline facility, dedicated to providing rapid responses;
- an E-mail facility for raising questions and receiving initial advice.

5.3.2 Dedicated Information Provision

More specialised information on IPR and IPR Enforcement needs to be readily available for SMEs, either in printed form or through web sites. If the most general business support organisations do not generate such information themselves, they should be able to access it from elsewhere and provide it for their clients.

This dedicated information should be of the following kinds :

a) Packaged information

Information resources available from business support agencies setting out in a clear, informed and accessible way, the main issues that SMEs should take into account in identifying their intellectual assets, in registering them where appropriate, in exploiting them and in dealing with infringements. Reference would normally be made in these information resources to appropriate support services and how to access them.

Resources could include basic information on third country arrangements in relation to types of protection, registrability, compensation, etc.

b) Web sites

These days, similar information needs to be made available from appropriate web sites, especially those with a sufficient profile to be easily accessible.

Links should be made to major information sites, such as:

Innovaccess: <http://www.innovaccess.eu/index.jsp>

and such other resources as the European Patent Office's guide to intellectual property information and services:

<http://www.epo.org/topics/ip-webguide.html>

<http://www.wipo.int/sme/en/>

<http://www.china-iprhelpdesk.eu/>

This core information could be supplemented by additional information relating to IPR enforcement, for example, notices of topical developments.

c) Contact information

Contact information, provided directly or over the web, is particularly important in this area, especially information about individuals and agencies that can assist SMEs on the ground in the country where the infringement is taking place.

For example, contact details of the custom authorities to which applications for action should be submitted are available on the DG TAXUD web site :

http://ec.europa.eu/taxation_customs/customs/customs_controls/counterfeit_piracy/right_holders/index_en.htm

d) Key Documents and Templates

A lot of time can be saved if key documents are made available. These could include :

- model forms for a National Application for Action and a Community Applications for action;
- model forms for notifying customs administrations about specific information or general trends concerning suspected counterfeit goods.
These forms are again accessible via the DG TAXUD web site, as above.
- Guides to help preparation for events where infringements may arise, including, for instance, model contracts for trade fairs with provisions for IPR arrangements between fair organisers and participants.

5.3.3 Dedicated Services

There are services that are specific to IPR and IPR enforcement. These should be provided either directly by general business support agencies or through arrangements with specialist providers. They include :

- IPR Audits and pre-diagnosis services;
- IPR risk assessment;
- infringement watch;
- assistance with due diligence checks on contractors and partners;
- technology watch;
- business intelligence watch;
- counterfeit investigations;
- help services in third countries;
- providing (non-legal) representation for specific SMEs on the ground where infringement is taking place;
- mediation services, such as
UK IPO : <http://www.ipo.gov.uk/sas/services/sas-mediation.htm>

An important consideration in the delivery of dedicated services and specialist advice was that it should be well integrated into other forms of innovation support, with enforcement being recognised as a distinct element in the general cycle of innovation.

5.3.4 Professional Advice

All business support services should seek to go beyond the immediate issue presented towards helping enterprises to improve their management capabilities over the longer term. The opportunities for doing this, however, are much greater when advice is being provided by support agencies or their associates.

In the context of IPR and its enforcement, helping management to build Intellectual Asset Management into the firm's core business processes is an important part of this general capacity building.

In addition, of course, access to specialised advice can be provided by support agencies and especially those that promote innovation. The services identified, therefore include :

- business Planning & Intellectual Asset Management: the place of IPR management within the firm's business strategy;
- initial legal advice - A 'First Aid' service – initial orientation prior to detailed legal advice;
- litigation-risk analysis;
- detailed legal advice and representation in civil cases;
- detailed legal advice and representation relating to criminal cases.



5.3.5 Training

Training is a central function of business support organisations. Indeed it could be argued that all business support is a form of training. In the area of IPR and its enforcement, the measures required go beyond the provision of training for SMEs to provision for those with whom SMEs have to interact.

Training measures should therefore include:

Training for SMEs

- self-help manuals and guides, structured learning packages, including on-line training material, such as: European Patent Office SME Case Studies : <http://www.epo.org/topics/innovation-and-economy/sme-case-studies.html> or the China IPR helpdesk case studies and solution centre: <http://www.china-iprhelpdesk.eu/>
- occasional seminars and workshops (not only sessions directly covering IP management issues but also as part of more general management education);
- staff training;
- IPR and Intellectual Asset Management training at a strategic level;
- development and application of an Intellectual Asset Management certification standard.

Training for the enforcement authorities

Police, Customs, Courts – Judges and Public Prosecutors

- specific training on IPR infringement issues and on the particular needs of SMEs.

Training for business support organisation staff

- training course on assisting SMEs on IPR management and enforcement;
- training materials for support staff, such as : The International Chamber of Commerce (ICC) Intellectual Property Tool-kit : <http://www.iccwbo.org/policy/ip/toolkit/id17122/index.html>

Management education

- coverage of Intellectual Asset Management issues in higher education business and management courses.

5.3.6 Actions by Business Associations and International Liaison

In addition to the provision of direct, broadly-based services, there is a need for services of a more strategic kind. Business organisations of all kinds have an important role here and, especially in their representative and international functions, can provide very effective support to SMEs. This can include :

- highlighting cases and lobbying at a national and European level;
- supporting alliance building;
- supporting test cases;
- raising and pursuing infringement cases in third countries.

5.3.7 Funding & Evaluation

Funding IPR enforcement can be very expensive and, in effect, it is often beyond the budget of many SMEs. There is no one answer to this problem, but the Expert Group identified a number of areas where initiatives by the public authorities are possible. The Group also supported the principles that any funding should be based on a clear identification of market failure and that initiatives had to be subject to both ex ante and ex post evaluation. Possible forms of support include:

- direct financial support to SMEs, including voucher systems to allow SMEs to access private services;
- supporting enforcement through the taxation system, especially by regarding provision for enforcement as part of research and development;
- open programme funding by public authorities (including IP management funding in innovation and R&D support);
- encouragement of private sector schemes, such as the development of broadly-based insurance schemes providing cover for enforcement;
- support for training programmes;
- evaluation initiatives and quality assurance programmes;
- self-regulating schemes with a voluntary commitment to standards.

Programme funding by public authorities in this context refers to situations where the public authorities issue calls for proposals to operate particular initiatives in the

IPR enforcement area, as opposed to the general funding of support services.

5.3.8 Access & Co-ordination Measures

Beyond the services provided directly to SMEs through support agencies, the Expert Group felt that there is a lot that the public authorities can do to co-ordinate enforcement action, to address particular problems and to provide better access for SMEs to the enforcement authorities (including market surveillance, customs, police, and other relevant authorities) :

- providing access to enforcement authorities
Regional & national co-ordination, including the establishment of Co-ordination Offices for IPR Issues and Enforcement at national level;
- EU co-ordination;
- promotion of networking, such as:
The Global Anti-Counterfeiting Network
<http://www.gacg.org/GACG2/Index.aspx>
- reaction to 'hot spots' of IPR abuse, for example, by co-ordinating IPR enforcement support in Trade Fairs;
- promotion of private enforcement, for example in contractual arrangements between fair organisers and participants.

A whole package of measures was, therefore, identified by the Expert Group, ranging from the widespread availability of initial information and orientation, through specialist information and advice to strategic measures needed to create the necessary co-ordination between the range of agencies and organisations that are involved in IPR enforcement. It was also apparent to the Group that the structure described needed to be animated by the consistent application of certain principles that are to be considered in the next section.



6 | Recommendations

6.1 Gathering the Material Together

As part of the process of characterising the set of services and measures required to support SMEs in the effective enforcement of intellectual property rights, the Enforcement Expert Group also built on earlier work in identifying the specific enforcement measures that are set out in the annexed Inventory and examined a number of particular cases that offered lessons for the implementation of good practice, before reflecting on all the material gathered, identifying common threads and deciding upon a full set of recommendations.

The Inventory of Enforcement Measures

The starting point for the Inventory of Enforcement Measures was the study by Technopolis entitled 'Effects of counterfeiting on EU SMEs and a review of various public and private IPR enforcement initiatives and resources' published in July 2007²⁰. This study forms the basis of the Inventory, after a modification of the classification system, a re-organisation of the presentation of the information and an increased focus on enforcement measures as opposed to general measures promoting awareness and the application of IPR. Other input was derived from a study carried out by the Austrian Institute for SME Research²¹.

The aim in compiling the Inventory was to assist the Expert Group in reviewing existing practice, as part of the process of defining the required measures as well as to leave behind a resource that could assist support agencies and the public authorities in the design of their own enforcement services and measures and serve as a direct source of information on available assistance for enterprises. The current version of the Inventory is to be found as Annex C.

IPR Enforcement Case Studies

A further output from the work undertaken by the Expert Group was the identification of a set of good practice cases. It was appreciated at the beginning of the

project that pointing to real examples of good practice is a practical way of stimulating interest in effective IPR support and that citing best practice case studies is a powerful way of promoting the more widespread provision of similar services. The Expert Group therefore gave careful consideration to the criteria for selecting specific cases, taking into account both the need for something of a convincing track record in the cases selected, but also the value of cases illustrating a creative approach in an area where much practice is in a state of rapid development.

At the same time, examination of particular cases served as a stimulus to thinking about the nature of the measures needed and of the principles that should lie behind them.

The set of case studies that are presented with this report are therefore examples that the Expert Group believes are among the most effective measures currently being applied, but that also provide a clear illustration of some of the most important themes in the overall report.

6.2 Central Issues

Throughout the detailed work on characterising a set of specific support measures, the Expert Group kept an eye on the larger picture and, in fact, one of the working sub-groups was specifically charged with looking at over-arching issues and connections between emerging themes. As the project developed these themes began to assume a greater prominence, as the principles became clear that lay behind the characteristics of the services and measures that were being described. Considerations of these principles ultimately led to the full set of Recommendations that are set out in the next section. However, it will help the interpretation of these Recommendations if some of the thinking on these central issues is first set out.

It is interesting that it proved relatively easy to establish a consensus on the core principles, suggesting that the lessons of experience in this area all tend to lead in the same direction.

6.2.1 The Need for Better Co-ordination at European and National Level

The direct experience of many members of the Expert Group meant that there was extensive, first-hand knowledge in the Group of the frustrations that arise with trying to work in an area where there are so many actors

²⁰ Technopolis 'Effects of counterfeiting on EU SMEs and a review of various public and private IPR enforcement initiatives and resources' to be found at : http://ec.europa.eu/enterprise/policy/industry/doc/Counterfeiting_Main%20Report_Final.pdf

²¹ Austrian Institute for SME Research 'Benchmarking Regional and National Support Services for SMEs in the Field of Intellectual and Industrial Property' to be found at : http://www.proinno-europe.eu/admin/uploaded_documents/Benchmarking-Report-SME.pdf

and where the protection of SME intellectual property rights is often so low in operational priorities. On the other hand, some were able to point to the practical benefits of co-ordination measures that have already been taken in some Member States.

It was widely felt that matters could be improved by creating organisations at a national level that could bring focus in tackling the problems SMEs face and that could help the various agencies to work together more efficiently. Furthermore, these national organisations would be a natural point of contact for international co-operation and especially for co-ordination of action at a European level through an EU Co-ordination Office.

An important part of this would be an improvement in the flow of information between agencies. Better intelligence about developments on the ground – on emerging problem areas, new trafficking routes, etc – would allow the limited resources available to be deployed more effectively. For this reason, the proposals for an IP Observatory were welcomed. However, it was felt that it was necessary to have an organisation that went beyond this essential, but basic, function to play a more active role in helping different arms of government – differing departments, the courts, the customs authorities and the police – to work together more effectively, both among themselves and with business and representative organisations and especially the intellectual property offices and support service providers. The co-ordination in the UK, which is presented as a case study by the project, is an encouraging example of what can be achieved.

There is clearly scope for an organisation that is able to analyse and promote good practice, especially as a way of helping agencies to work together at an operational level. There may also be a function for the Co-ordinating Office in the organisation, and possibly delivery, of some aspects of training for the relevant actor groups. Above all, the organisation should have the function of analysing current practice and formulating policy advice for the public authorities and practical advice on operational matters for the agencies with which it works.

It is worth pointing out that in making a Recommendation for the creation of co-ordination offices, the Expert Group wished to emphasise that they saw this development, not only as essential for providing coherent as-



sistance to SMEs in IPR enforcement, but also as a way of improving the operational efficiency of the agencies concerned. The Group is convinced that such a development could be very cost-effective.

6.2.2 An Integrated Intellectual Property Service

A central element in a more co-ordinated support provision for SMEs is the bringing together of specialist IP information and advice services into a common service. The organisations that now deliver these business support services were originally established to process registrations of intellectual property rights or to represent the interests of rights holders. As these organisations have developed in recent years they have often put a greater emphasis on developing more active and more customer-oriented services and on helping enterprises to make better use of their basic facilities and the information and expertise that they have accumulated over the years.

This reorientation of the traditional perspective of intellectual property organisations also puts them in a better position to contribute to a wider innovation policy agenda, better able to support research into past ideas and inventions and to engage with other support structures, such as science parks and business incubators that encourage developments of the knowledge economy.

Furthermore, it is increasingly the case that intellectual property does not rest on a single patent or trade mark or is not covered wholly by a single instance of copyright. Products are now commonly made up of technology bundles that involve differing forms of intellectual property, among which there can be many individually

registered and unregistered rights. It is not unusual, for instance, for a product to make use of numerous different patents and registered designs, as well as software covered by copyright, and to be sold under a distinctive trademark. Moreover, the formal intellectual property will often be supported by other forms of knowledge and skill that constitute a broader range of intellectual assets that the producer has at its disposal.

It is still the case, however, that the provision of IP services often reflects traditional distinctions and organisational forms and that frequently this has left a legacy of uneven provision, notably in relation to support for business activities whose intellectual property takes the form of copyright and neighbouring rights.

The Expert Group takes the view that the movement towards an integrated intellectual property service that is evident in some Member States should become the norm, both as a basis for delivering a more satisfactory service to enterprises and as a necessary adaptation to developments in the knowledge economy.

Note, however, that this does not mean that services particular to specific types of intellectual property should be abandoned. It will still be necessary to have specific procedures for the registration of patents, utility models, trademarks and to have staff who are specialists in each of these areas. Rather it is a matter of ensuring that a seamless provision of support services can be made, the details of which are governed by the needs of the enterprise across a range of potential IP issues, as distinct from being determined by demarcations based on the traditional competences and interests of the organisations concerned. This, after all, is only a particular application of the more general business support principle that it is up to support providers to organise themselves to provide (either directly or indirectly) what enterprises need, rather than to enterprises to have to search out what each agency can provide.

6.2.3 Beginning with Intellectual Asset Management

In considering the principles behind the detail of the services to enterprises that it was considering, the Expert Group was persuaded that a systematic approach was needed. In particular, it was felt that the objective in providing support to enterprises should not only be to address the immediate problem that they face, but to do

so in a way that helps the enterprise build its capacity to manage similar problems in the future - or preferably to avoid them altogether. This suggests a longer term and more holistic view of the nature of the problem and has been characterised, in descriptions of good practice in SME support, as 'adopting a capacity building approach'.

In the context of IPR enforcement, this perception was reinforced by the practical consideration that it is a lot easier to enforce IPRs if they have been properly managed from the start. In other words, enforcement is easier if IPRs have been properly developed and validated in the first place, if infringement of other IPRs has been avoided, if the IPR is well documented and if, where appropriate, it has been registered. Enforcement then was seen to be based on proper IP management, or, taking on board the point that formal intellectual property is usually only a part of the total knowledge and skills resources that an innovative enterprise deploys, on proper intellectual asset management.

The conception, therefore, that the Expert Group sees as lying behind the delivery of almost any IP enforcement services, is that the professional staff concerned should try to introduce the principles of Intellectual Asset Management (IAM) in the course of addressing the immediate issues raised by the client and, when appropriate, support this with formal training. Promoting Intellectual Asset Management (as illustrated for example in the case study on the Scottish Intellectual Asset Centre) and its systematic perspective on the development of all the experience, creativity and ideas of enterprises, also aligns the proposed approach with the new innovation paradigm that sees the need for continuous innovation across the activities of an enterprise.

In this context, it was seen that there might be an advantage in codifying the principles of Intellectual Asset Management and its associated procedures in some form of standard, although the Group as a whole was sympathetic to a plea from some of its members that small enterprises should not be burdened by another formal set of procedures to comply with, along with those arising with quality and environmental standards and similar formal requirements. Rather it was felt that the codification of intellectual asset management procedures should be used to provide a common reference point and a framework for delivering consistent support services and training.

6.2.4 Integration with Innovation Support

The issues referred to in the previous three sections were perceived by the Expert Group to be part of a larger and possibly much more significant shift in the perception, on the part of both policy makers and practitioners, of the place of IPR in a modern, knowledge-based economy. This has been expressed as saying that IPR, its management and its enforcement are all being acknowledged as critical stages in the innovation cycle.

At a policy level, as has been seen above, IPR has taken its place as a recognised element in the renewed Lisbon strategy and in all the developments that follow on from that in a range of policy areas. Recognition of the need for effective IPR enforcement has had a lower profile, but is part of the overall picture. At a practical level, it has been increasingly recognised that effort devoted to the promotion of research and innovation can be wasted if steps are not taken to protect the resulting intellectual property.

The time has therefore come, the Expert Group feels, for a greater effort in following up these insights and making IPR enforcement a significant feature of innovation support. This is partially a matter of an adjustment in the services provided by innovation support agencies, science parks, incubators, regional development agencies and, to this extent, these agencies are the prime targets of many of the recommendations of this report. It is also a matter of adjusting arrangements in the funding of research and innovation. Here a review is necessary of the requirements made of those making proposals under EU and national R&TD programmes and possibly of the definitions of eligible expenses. The aim would be to move to a situation where proposers are not only required to have in place arrangements for the attribution of IPR, but also for its effective management and enforcement. In many cases this would mean an adjustment of the definition of eligible expenses. In effect, this is saying that IPR enforcement should be recognized as a legitimate part of the research budget.

6.2.5 The Market Failures Underlying the Need for IPR Support

The Expert Group was conscious from an early stage that it needed to take into account the funding implications of its Recommendations and wherever possible it has proposed changes that require a reallocation of exist-

ing resources, or indeed has made proposals that it believes will increase the efficiency and cost-effectiveness of existing arrangements. This applies, for instance, to the proposals on better co-ordination of enforcement agencies and on greater provision for enforcement within R&TD programmes. However, it was also appreciated that the Group needed to check on a more fundamental point. This concerns whether or not public support for IPR enforcement is justified in any form and the related question of whether or not public provision is squeezing out private sector provision.

The Group is aware that it is a fundamental assumption of economic policy in modern market economies that government action should avoid disrupting market processes. Any departure from this general assumption needs a specific justification and proposing that governments should spend public money to support small firms in a particular way is a departure from this principle.

There are, however, often quite good reasons for public action in markets, especially when they help to address a 'market failure'. In the terminology of economics, market failures are said to arise when consumer preferences cannot be expressed effectively through normal market mechanisms and in consequence there is a distorted allocation of resources. The question for the project, therefore, was: are there market failures that arise in the provision of services relating to IPR enforcement?

There certainly are private sector providers of IPR services, particularly various kinds of legal services, but there are also clear gaps in provision and also areas where SMEs face particular difficulties. The costs of litigation pose a particular problem for many SMEs.

The provision of basic information and advice is one of the areas where there appears to be a gap in the market. The economics of information provision is relatively complex, but there are a number of reasons for supposing that market failures exist in this area, including the observation that information of this kind has a number of the characteristics of a 'public good'. These arguments explain why there is a gap and have also been rehearsed as justification for the provision of information and advice services as part of general business support. To this extent services of this kind relating to IPR enforcement are just a particular example of a well-established case.

However, these arguments do not apply to the provision of support for SMEs' enforcement action. Here two considerations arise. The first is that a market failure is apparent in that SMEs face a situation of asymmetric information when selecting services, such as legal representation, especially in third countries. They are simply not in a position to know if the lawyers or business advisers are likely to provide value for money and therefore act more defensively than the situation really merits. There is therefore a possibility of what is known as 'adverse selection'. Secondly, it appears that the situation is characterised by the presence of significant 'externalities'. These arise in that the benefits to society of an individual firm taking action to assert IPRs, for example in a court, go well beyond the benefits felt by that particular firm – assuming the action is successful. If an IPR case is successful, the individual firm that has asserted its rights will achieve certain results that affect its own returns from the market (including any compensation that is received). However, there will also be benefits to other IPR holders that are not party to the case. First of all, the offender will be directly stopped or discouraged from abusing the IPRs of other individuals or firms. Then there will be a demonstration effect – other abusers of IPR will be discouraged from pursuing their activities, other IPR holders will be encouraged to enforce their rights etc. Finally there will be a general benefit in that the rule of law will be strengthened, IPR systems themselves will be strengthened and further creative activity will be encouraged to the ultimate benefit of society in general.

In general terms then, there are grounds for supposing that public support for a range of services and measures in the area of IPR enforcement is warranted. Each individual measure needs consideration in greater detail, possibly involving a formal impact assessment, especially for new measures, but it is clear from the work undertaken by the Expert Group that a mixed solution is often possible.

The Group looked at the particular issue of how SMEs might be able to fund their involvement in enforcement action through the courts. It was clear that most SMEs would find it difficult to take on the full costs of an infringement action through the courts, even if they were eventually successful and were able to claim damages. A number of possibilities of public support presented themselves, especially given the externalities referred to above. Some, such as improved mediation services might remove the need for court action. Others, such as voucher schemes, provide (partial) di-

rect support, by subsidising the use of private services. An examination of taxation regimes, as recommended in the Marchant Report, may also help. A more general solution to the problem, however, that the Expert Group felt needs further consideration is that presented by appropriate insurance schemes. These have been much discussed in recent years and they involve considerations that go well beyond the scope of the project. However, the Group was able to point to a private sector insurance scheme for patent enforcement operating in Denmark (with some non-financial public encouragement) that has interesting features that might be replicated more widely. This example is included among the case studies.

In general, then, it was decided that the group would avoid proposing measures where there was not a *prima facie* case of market failure, but would suggest that closer examination was more appropriate at an implementation stage, when detailed investigation of the precise form of the proposed intervention was possible. Otherwise, of course, the normal EU competition rules should apply, including those covered by 'Block Exemption Regulations for State Aid'²² and arrangements covered by the 'Community Framework for State Aid for Research and Development and Innovation'.

²² *Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Article 87 and 88 of the Treaty (General block exemption Regulation)*



6.3 The Recommendations in Full

The previous section has set out some of the broader considerations that underpinned the specific set of measures proposed by the Expert Group (section 5.3)

The Group was aware that the situation with regard to IPR enforcement is continuously changing and that as well as proposing specific measures, it was important to set out the principles that could shape new developments as needs and the responses required evolve over time.

In order to assist the application of the principles identified, the Expert Group expressed them as a set of Recommendations. This Report begins with a summary statement of these Recommendations; the following sections provide a lot more detail and a context for the project's main messages.

The Recommendations are addressed to public authorities and especially to those with responsibility for matters relating to intellectual property, for SME policy and business support and for the promotion of research and innovation. They are also addressed to business support professionals, especially those seeking to help enterprises make more effective use of their intellectual assets.

The Enforcement Expert Group recommends the following:

IPR Enforcement Policy

- 1) *It is necessary to establish **Co-ordination Offices** for IPR enforcement issues, both at a European and at national levels.*

Currently IPR support is highly fragmented and frequently duplicated. It needs to be organised more efficiently. The Expert Group proposes that the Co-ordination Offices should be responsible for promoting, co-ordinating and monitoring IPR enforcement and helping existing agencies to improve their services and work better together, not least through the identification and exchange of good practice. The Co-ordination Offices will need to have the appropriate authority and resources to do this effectively, although the Expert Group is convinced that much can be achieved by more efficient organisation, within existing resources.

A major task of the Offices will be to ensure that there is an efficient exchange of operational infor-

mation between the different agencies concerned with IPR enforcement.

The proposed IPR Co-ordination Offices may not need to be new organisations. Instead, the coordination role could be given to an existing organisation by a broad partnership of stakeholders. The precise configuration will, however, vary from one country to another depending on particular circumstances.

- 2) *The idea of creating an **Observatory on IP crime** at an EU level is supported, particularly if the Observatory monitors the effects of IP crime on SMEs.*

This could be a role taken on by the EU Co-ordination Office, especially if it is extended to promoting awareness and education.

- 3) ***Communication with business support agencies** will be a very important function for the Co-ordination offices.*

As a focal point for the development of IP support for SMEs, the Co-ordination Offices will need to communicate well with the organisations whose practices they aim to improve, providing a clear sense of direction and practical resources for facilitating the necessary changes. For this they will need, among other things, excellent web site facilities. Furthermore, although it is not envisaged that they will provide services directly, no doubt they will receive enquiries from SMEs. For this they will need efficient signposting.

- 4) *The **activities of the European Commission relating to Intellectual Property and the enforcement of IPRs** need to be more co-ordinated, especially in their interaction with stakeholders outside of the Commission.*

The diverse aspects of policy relating to IP and the enforcement of IPRs are dealt with by a number of different units across the European Commission. The perception of the Expert Group is that these activities need to be more visibly co-ordinated and a seamless interface created for interaction with all the different parties with an interest in these issues.

- 5) *Measures need to be taken by the public authorities to **bring home to consumers** the implications of their use of counterfeit goods.*

Criminalising consumers should be avoided, but other measures can be contemplated to make consumers aware of the seriousness of their actions in using

counterfeited goods. Sanctions equivalent to parking fines might be considered, for instance. It will be necessary to involve the consumer associations in this process and it might be an area where the Co-ordination Offices can usefully bring forward proposals.

6) *EU and national authorities should aim for a **Zero Tolerance Policy** in IPR enforcement.*

Although it is recognised that there are practical difficulties with a zero tolerance policy and that it would be controversial, many of the Expert Group feel that it is important that the public authorities should signal their determination to address the abuse of SMEs' IPR. An announcement of a zero tolerance policy would send a clear message that even relatively small-scale abuse is not acceptable and will help to deter abuse occurring in the first place.

7) ***TRIPS Minimum Enforcement Standards** should be properly implemented.*

This would be a very useful and practical step to help enforcement agencies that assist SMEs in third countries.

Support Service Provision

8) *The design of all support services has to start with **the needs of users (SMEs)** and have a **distinctive customer service orientation**.*

This is a basic principle underlying all effective business support services, but it is often difficult to apply. It is not easy for established organisations to move from offering simply what they have to being driven by what clients need. It means that services must be kept constantly under review and that support agencies should be fully aware of the differences between enterprises and their changing needs. The principle also means that provision should be adapted to differences in cultures.

9) *Support service provision should be **co-ordinated nationally**, with local access to IPR information, advice and IP management training being provided by the established business support organisations, in **close co-operation with specialist IP agencies**.*

Business support is provided at different levels and by many different types of organisation with differing degrees of specialisation. However, local access is valued by many SMEs, whose first call is

often to a local Chamber of Commerce or similar broadly-based service. National co-ordination should ensure that generalist agencies are supported by the appropriate IP specialists and that as much support as possible is delivered through the enterprise's first point of contact.

10) *Where not currently in place, a **common Intellectual Property service** has to be developed.*

In some Member States there continue to be different support services provided for different kinds of IP. Some patent offices may be unable to provide advice on copyright matters, for instance. A modern service requires that traditional distinctions are overcome and that integrated centres of expertise are developed relating to all IPR matters.

11) *Co-ordination should help generate **common support resources**.*

One of the advantages of co-ordination in business support services in general and in IP enforcement services in particular is that support resources, such as information sheets, self-help guides, manuals and structured learning packages can be created more efficiently and consistently. This not only allows these resources to be produced more cheaply, but also enhances their quality and their impact.

12) *Support should be structured along the lines set out in the **definitive set of IPR Enforcement Measures** (Section 5.3).*

The Expert Group has described the structure of the IPR support services and measures that it believes SMEs need. Good practice cases have also been cited to assist the transfer of practice from one country to another.

Innovation & Intellectual Asset Management

13) *SMEs should be encouraged to operate within **the new innovation paradigm** that sees scope for innovation in all the processes of a business.*

All support agencies should encourage their clients to see potential for innovation in their businesses. Those clients who seek help with the management and enforcement of their IP, in particular, should be encouraged to see the management of their intellectual assets as the operational side of an innovation strategy.

- 14) *Effective **enforcement by businesses** has to begin with proper **IP management**.*

A core conclusion of the Expert Group is that for SMEs the enforcement battle begins with good IP management. It is not possible to enforce rights that are not clear and valid, well documented and, where appropriate, registered. This point has to inform all enforcement support services. At the same time it should be appreciated that formal IP represents only a part of an enterprise's full set of intellectual assets.

- 15) ***IPR support services** should all be based on **the principles of Intellectual Asset Management (IAM)**.*

Good business support practice is to help clients to meet immediate problems by building their longer-term capacities and competencies. In the context of IPR enforcement, this means helping enterprises to develop effective management of all their intellectual assets - formal IP and less formal knowledge and skills.

- 16) ***Innovation agencies and innovation support programmes** have to make effective provision for IPR enforcement and promote the discipline of **Intellectual Asset Management**.*

To embed the previous recommendations, innovation support programmes, at both EU and national levels, should make provision for IAM and the enforcement of IPR in their guidelines, project management and budgetary arrangements. Equally, those responsible for the promotion of innovation need to encourage the development of IAM disciplines in their clients, including planning for enforcement. This will need special arrangements at the cluster level, where innovation policy increasingly has an important focus.

- 17) *Development and application of an **Intellectual Asset Management certification standard** should be encouraged.*

Given its central role, it would be a great advantage to all concerned if the core features of Intellectual Asset Management were agreed in the form of a standard. In this way, all concerned would have a common reference point. It will be important to include practical elements in this



standard, such as the advantage of using supply and logistics management to avoid problems. This will encourage the adoption of such procedures as every-day practice.

Some lessons can be drawn from the experience of developing quality standards. However, it is very important that care should be taken to ensure that this does not become another formal burden on SMEs, but is used more as a reference point and as a training aid in the development of internal management practice.

- 18) ***Intellectual Asset Management** should become more prominent in the **curriculum of business education and training**, especially management training.*

If IAM is to become a more prominent aspect of business management, then this should be reflected in business education and training, including those courses that focus on small firm management.

- 19) ***Intellectual Asset Management** should be promoted at the time of **business registration** and where public assistance in any form is provided to enterprises.*

There are a number of opportunities to promote more effective business strategies among the SME population. Providing information with reference to IAM at the time of registration would be particularly effective, both because it would reach all new formally constituted businesses and it would do so at a time when many are receptive to advice of this kind.

Enforcement-specific Measures

- 20) *Enforcement agencies – customs, the police and the courts – need a **better understanding of SME issues** and this need should be met by extensive **training** and by **promoting the exchange of good practice**.*

With budgetary constraints and the obvious attraction of achieving dramatic results, enforcement agencies often choose to concentrate on large-scale IP problems, forgetting that an apparently small-scale abuse can have devastating effects on a large number of businesses and on local communities. A greater understanding of the issues facing SMEs is necessary and the compelling evidence of the significance of their problems brought to the attention of enforcers. Above all, SME-friendly procedures need to be developed. This will not only help SMEs, it will also help the enforcement agencies to establish appropriate priorities and operate more efficiently.

- 21) *The various parties involved in enforcement **need to get to know each other better***

A number of the parties involved in enforcement very much operate in their own world. Stimulating a cross-disciplinary approach or simply getting the different agencies together to focus on enforcement issues faced by SMEs could go a long way to improving the efficiency of processes and helping to create a greater awareness of SME needs in the area. This is an action that could usefully be pursued by the Co-ordinating Offices.

- 22) *Consideration should be given by the Member States to establishing **dedicated commercial courts**, with particular expertise in IPR matters.*

The volume of IP and contractual arrangements for sharing it are increasing with the development of the knowledge economy. The issues are complex and are increasingly perceived to need qualified staff to provide the high quality decisions that businesses of all kinds need, in order to innovate efficiently. In these circumstances and on the basis of their practical experience, the Expert Group recommends the development of dedicated commercial courts at a national level, aligned with the provisions for any eventual unified patent litigation jurisdiction.

- 23) ***Mediation services** need to be developed and made more effective.*

Sometimes it may be advantageous to all the parties to resolve IPR issues without recourse to formal proceedings in court, especially when IPR infringements have been inadvertent. There are already examples of mediation services of various kinds and it would be useful to examine good practice and promote its best features.

- 24) *Many business support organisations have arrangements to facilitate **SME access to lawyers specialising in IP matters**. These practices need to become more widespread.*

Business support organisations frequently arrange access for SME clients to specialised advisers in the commercial sector, including lawyers specialising in IP matters. Often, discounted or free initial consultations are part of this arrangement, which will frequently be of benefit to all the parties concerned.

- 25) *Potential **hot spots** of counterfeiting and piracy, such as **trade fairs**, should be targeted by special measures to ensure swift and effective action.*

Trade fairs are often occasions when counterfeiting and piracy become apparent. They can also be an important stage in the establishment of distribution networks for goods that infringe IPRs.

Organisers of trade fairs can do a lot to restrict illicit activities at their events, especially in the provisions they make in their contracts with exhibitors and by co-ordinating the various agencies needed to make a rapid response to problems, once they have been identified. There is a substantial amount of good practice in this area that could be replicated more widely.

- 26) ***Trade associations and anti-counterfeiting and anti-piracy organisations** should be encouraged to make greater provision for SMEs.*

Trade associations and anti-counterfeiting and anti-piracy organisations play an important part in highlighting abuses of IPR and in lobbying for solutions to IPR problems. However, as subscription membership organisations, they naturally reflect the concerns of their members, which tend to be larger businesses. They should be encouraged to

widen their membership base and include more SMEs and also to provide a wider range of services. In this way these organisations can enhance their status as representative organisations.

More effective co-ordination at a national and international level could also be promoted.

- 27) *There should be better co-ordination and a more consistent development of enforcement services in **third countries**.*

Agencies providing IPR services in third countries, such as IP desks at embassies and consulates or Bilateral Chambers of Commerce, can play a very important part in assisting SMEs to address problems in third countries. At the moment there are some interesting cases, but there could be better co-ordination of these services, both nationally and between Member States, and they could be developed more consistently, especially if this were based on a clear action plan.

Service Quality and Evaluation

- 28) **Evaluation**, embedding recognised evaluation principles, should be built into enforcement support measures and related programmes.

In order to promote a continuous improvement in the quality of IPR enforcement and to conform with good practice, IPR support measures should be regularly evaluated in line with current evaluation principles. Account should, however, be taken of the emerging and occasionally experimental nature of some of the provisions and there should be care not to over-evaluate.

- 29) A degree of **experimentation** ought to be encouraged and **best practice exchanged**, not least by the EU and national co-ordination offices.

The fact that IPR enforcement is a relatively new area for many business support agencies and that there is an active process of innovation in the nature and form of the support provided should be welcomed and encouraged. In some instance, where the support agencies are breaking new ground, opening up new markets and facilitating the establishment of commercial services in

the area, this has to be recognized and effectively managed. It is important in all this that the results of experimentation are made known, best practice is identified and effective dissemination takes place. The Co-ordination offices could make a very useful input into these processes.

Funding

- 30) *Member States should develop a comprehensive strategy to address **the problem of funding IP protection and enforcement**.*

SMEs find it difficult to pay for enforcement action, especially if it involves litigation. There are a number of possible responses to this problem, but also issues of principle relating to public intervention and practical issues, not least to do with the securing of funding. The report makes reference to some of these issues, but they need further investigation.

- 31) *This strategy should include a consideration of **insurance schemes** that provide cover for enforcement.*

One of the possible responses to the problems of the funding of enforcement is the promotion of insurance schemes. There are various problems with launching such schemes, not least that in smaller Member States of establishing a sufficiently broad base to allow an acceptable spreading of the risk. However, ways are being found to get around these problems and to provide a private sector solution. Member States should look further at the possibility of supporting voluntary insurance schemes, assessing the benefits they may provide for SMEs in enforcing their IPRs.

- 32) **Anti-counterfeiting and Anti-piracy organisations** should be encouraged to provide support for **test cases**.

As well as being encouraged to broaden their membership, anti-counterfeiting and anti-piracy organisations should be asked to investigate the scope for broadening the range of their activities and taking on test cases. In effect, they would be helping SME members to pool their resources and contributing to a resolution of the problems SMEs face in funding enforcement action.

Practical examples of current implementation of a number of these Recommendations are illustrated in the annexed case studies.

7 | Conclusions

7.1 The Significance of the Expert Group's Work

European SMEs are increasingly competing in the international market place. Their competitiveness depends these days on features that are not simply related to price. Creativity and innovation have a growing role in allowing small businesses to differentiate their products and Intellectual Property Rights are a useful tool for securing the revenues stemming from this creativity and innovation. However, the registration of IPR is just the first step in a cycle that requires the management and enforcement of IPR to be complete. Only a comprehensive approach to IPR brings the expected benefits. SMEs often lack the knowledge and resources to integrate the full IPR cycle into their business processes. Consequently, the development of measures in this area is necessary to complement existing EU policies.

In the *European Charter for Small Enterprises*, SMEs were promised that the EU and Member States would promote 'top-class small business support'. In particular, there was the commitment that :

'We will co-ordinate Member States and EU activity to create information and business support systems, networks and services which are easy to access and understand, and relevant to the needs of business'

The Small Business Act, with its focus on the transition towards a knowledge-based economy, and the Commission's *Industrial Property Rights Strategy for Europe* have both emphasised the importance of innovation, and within that, effective IPR management, as a key area for engagement with SMEs. Furthermore, they have both moved the debate

on IPR enforcement forward by calling for a series of developments in enforcement support provision for SMEs.

The work of the IPR Enforcement Expert Group, therefore, can be seen as making a direct response to this active area of EU policy development. In particular, by making productive use of the experience and expertise of its members, it has been able to provide substantial detail on the next practical steps that have to be taken.

7.2 Implementation Strategy

The Expert Group is conscious of its advisory role. Nonetheless, it is confident that the common sense in its approach and recommendations is evident and will command a lot of support. The major issue rather is being able to communicate the conclusions of the Expert Group and assist in their take-up.

A concluding conference for the project is planned in Brussels for April 2009. This will present a useful opportunity to discuss the results of the project with a wider group of policy makers and business support professionals. Some thought, however, has been given to other means of communicating the Group's conclusions. Discussions are continuing with IPeuroAware and the Commission's networks to ensure that the results are known to some of those most immediately concerned. The complete list of Recommendations of this Report is expected to be of interest to people who are already familiar with the area. To reach the wider audience, for whom a more concise message is appropriate, the 32 Recommendations in the full list have been reduced to the 9 concise Key Messages that begin this document.



8 | Expert Group members

This report is largely the work of the Export Group members, whose interest, enthusiasm and expertise animated both written and in-person exchange over the last 18 months. We would like to acknowledge their contributions here.

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http://ec.europa.eu/enterprise/enterprise_policy/industry/ipr_conference.htm

http://ec.europa.eu/enterprise/enterprise_policy/industry/ipr_report.htm